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In The

Supreme Court of the United States

October Term, 1988

WILLIAM DYKENS,

Petitioner,

v.

EASTERN AIRLINES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit's holding that the Federal Aviation Act (49 U.S.C. § 1305(a)(1)) pre-empts California's civil rights law (Cal. Civ. Code §§ 54.1(a) and 54.3), enacted to enable disabled individuals to participate in the social and economic life of the state, conflicts with this Court's holdings that there is a presumption against finding pre-emption of state law in areas traditionally regulated by the states.

2. Whether the Ninth Circuit's holding that the anti-pre-emption provision of the Aviation Act (49 U.S.C. § 1506) does not save Cal. Civ. Code §§ 54.1(a) and 54.3, conflicts with *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976) and *Bieneman v. City of Chicago*, 864 F.2d 463 (7th Cir. 1988), *cert. denied* 88-1496 (1989).

LIST OF PARTIES

Petitioner is unable to list all parent companies, subsidies or affiliates of respondent Eastern Airlines, Inc.

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No. _____

In The

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October Term, 1988

WILLIAM DYKENS,

Petitioner,

v.

EASTERN AIRLINES, INC.

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner William Dykens respectfully prays that a writ of certiorari issue to review the judgment and memorandum of the United States Court of Appeals for the Ninth Circuit entered in the above-entitled proceeding on January 5, 1989.

OPINIONS BELOW

The memorandum of the Court of Appeals for the Ninth Circuit is unreported and is set forth as Appendix A, App. 1-3.

The Findings of Fact and Conclusions of Law of the United States District Court for the Central District of California (Byrne, D.J) is unreported and is set forth as Appendix B, App. 4-9.

JURISDICTION

On March 25, 1986 petitioner filed his compliant for damages in the Superior Court of the State of California, for the County of Los Angeles alleging, *inter alia*, that respondent Eastern Airlines, Inc., violated federal and state law when it wrongfully refused to fly him because of his physical disability. Respondent properly removed the case to the United States District Court for the Central District of California.

The Ninth Circuit filed its unreported memorandum on January 5, 1989. App. A. Petitioner's duly filed petition for rehearing, with a suggestion for rehearing en banc, was denied on March 6, 1989. A copy of the order denying the petition is set forth as Appendix C, App. 10.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES

A. *State Laws:*

Cal. Civ. Code § 54.1(a) (West 1982) provides in relevant part:

> [P]hysically disabled persons shall be entitled to the full and equal access as other members of the general

> public, to accommodations, advantages, facilities and privileges of all common carriers, airplanes, . . .

Cal. Civ. Code § 54.3 (West 1982) provides in relevant part:

> Any person or persons, firm or corporation who denies or interferes with the admittance to, or enjoyment of the public facilities as specified in section [ ] . . . 54.1, or otherwise interferes with the rights of . . . physically disabled persons under section [ ] . . . 54.1 . . . is liable for each such offense for the actual damages and any amount as may be determined . . . up to a maximum of three times the amount of actual damages . . . and such attorneys fees as may be determined by the court in addition thereto, suffered by any person denied any of the rights provided in section [ ] . . . 54.1.

B. *Federal Statutes:*

Title 49 U.S.C. § 1305(a)(1) (West Supp. 1988) provides in relevant part:

> [N]o state . . . shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to rates, routes, or services of any air carrier having authority . . . to provide air transportation.

49 U.S.C. § 1506 (West 1976) provides:

> Nothing contained in this chapter shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this chapter are in addition to such remedies.

STATEMENT OF THE CASE

A. On March 25, 1986, petitioner, a mobility handicapped individual, filed a complaint in the Superior

Court of the State of California for the County of Los Angeles alleging that Eastern Airlines, Inc. (Eastern) had subjected him to handicap discrimination in violation of Cal. Civ. Code § 54.1(a) when the airline refused to permit him to fly without an attendant. In accordance with Cal. Civ. Code § 54.3, petitioner sought attorneys fees in addition to compensatory and treble damages.[1] Eastern removed the case to the District Court for the Central District of California.

Following a court trial, the District Court found that petitioner was a "qualified handicapped person" who was eligible to board Eastern's aircraft as a non-ambulatory person able to take care of his own needs, and that Eastern had wrongfully refused to transport petitioner because of his disability. Notwithstanding its ruling that Eastern had wrongfully refused to transport him, the District Court ruled that petitioner's "claims under California Civ. Code §§ 54.1 and 54.3 are pre-empted by 49 U.S.C. § 1305(a)." App. 9. The District Court also ruled however, that Eastern was "liable to plaintiff for a breach of its common law duty under *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976)."[2] App. 9. The District Court awarded petitioner $15,000 in compensatory damages, stating that petitioner experienced the inconvenience of making another trip to the airport which was difficult for

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[1] Petitioner also sought damages for infliction of emotional distress and for violation of federal law. The District Court denied relief on these causes of action, App. 8-9, and petitioner does not challenge those rulings.

[2] The Ninth Circuit assumed that "the ruling was based upon state common law" and disregarded "the pre-emption problems inherent in such a ruling." App. 3.

a handicapped person; that he missed one day of vacation; that he was without his belongings for one day since his baggage was on the plane from which he was excluded; and that he suffered justifiable emotionally severe agitation of a temporary nature. App. 7.

The District Court denied petitioner's claims for attorneys fees and treble damages, and petitioner appealed from said ruling. Eastern did not file a cross-appeal.

B. On January 5, 1989, the Ninth Circuit affirmed, in an unpublished memorandum, stating that the District Court had properly determined that under *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984), Cal. Civ. Code §§ 54.1(a) and 54.3 were pre-empted. App. 2. The Ninth Circuit quoted *Hingson* as follows:

> [Federal] pre-emption [by the Federal Aviation Act, 49 U.S.C. § 1305(a)] is not limited to those state laws or regulations that *conflict* with federal law. It pre-empts state laws and regulations "*relating* to rates, routes, or services." Regulation of air carrier seating policies for handicapped passengers involves the regulation of services within the meaning of [the Federal Aviation Act].

App. 2.

After quoting *Hingson* the Ninth Circuit stated that "[j]ust as the passenger's claim for unlawful discrimination on the basis of handicap was held pre-empted in *Hingson*, so must this similar claim be held pre-empted here." App. 2. The Ninth Circuit made no attempt to defend *Hingson*, nor did it address petitioner's

submission that *Hingson* should be overruled because it is in conflict with this Court's recent pre-emption cases.[3]

While the Ninth Circuit did not discuss this Court's pre-emption cases, it did address petitioner's argument that it should re-examine *Hingson* in light of *Air Transport Ass'n v. Public Utilities Com'n*, 833 F.2d 200, 207 (9th Cir. 1987), where the Court stated that "there was nothing in the history of the Airline Deregulation Act to indicate congressional intent to pre-empt state regulation of utilities insofar as such regulation affected airlines," and therefore "the Federal Aviation Act did not pre-empt California utility regulations that prohibited the surreptitious monitoring of employees' telephone conversations." App. 2. The Court ignored the fact that there is similarly nothing in the Aviation Act suggesting that Congress intended to pre-empt California's anti-discrimination law.

The Ninth Circuit also noted in passing that there was "a pre-emption problem inherent" in the District Court's ruling that Eastern was liable for damages for violating California's common law, in light of its ruling

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[3] In his opening brief, petitioner relied on the following cases: *California Federal Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272 (1987); *Hillsborough County Fla. v. Auto Med. Labs*, 471 U.S. 707 (1985); *Jones v. Rath Packing Co.*, 430 U.S. 519 (1977); *Louisiana Public Serv. Com'n v. F.C.C.*, 476 U.S. 355 (1986); *Maryland v. Louisiana*, 451 U.S. 725 (1981); *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290 (1976); *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238 (1983). The Ninth Circuit did not mention any of these cases.

that California's parallel statutory provision was pre-empted.[4] App. 3

C. In his petition for rehearing, petitioner urged the Court of Appeals to impanel an en banc to overrule *Hingson* because it conflicts with this Court's pre-emption cases. Petitioner called the Ninth Circuit's attention to the fact that the District Court relied on the antipre-emption provision of the Federal Aviation Act, 49 U.S.C. § 1506, when, citing *Nader,* it held Eastern liable for breach of California's common law duty of carriage, and argued that *Nader* made clear that the antipre-emption provision bars pre-emption unless it be found that pre-existing common law or statute is so repugnant to the Aviation Act that the survival of the state right would in effect deprive the federal act of its efficacy; "in other words, render its provisions nugatory." *Nader, supra,* 426 U.S. at 298.

Relying on *Nader* petitioner argued that the impact that might result from the imposition of tort liability on Eastern pursuant to Cal. Civ. Code §§ 54.1(a) and 54.3 would be merely incidental and that, accordingly "both federal and state law may co-exist as contemplated by 49 U.S.C. § 1506." *Nader, supra,* at 300. Moreover, petitioner noted that *Nader* recognized that "a wrong may be of the sort that calls for compensation to an injured individual," and argued that this was such a case.

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[4] *Hingson* itself contains the same inherent inconsistency. After ruling that Cal. Civ. Code § 54.1(a) was pre-empted, the Ninth Circuit added that Mr. Hingson's "claims for intentional infliction of emotional distress . . . are not pre-empted." 743 F.2d at 1416.

Petitioner asserted that Cal. Civ. Code §§ 54.1(a) and 54.3 were civil rights laws which depended heavily upon private enforcement, and that the remedies provided by § 54.3 – attorneys fees and treble damages – were essential if private citizens like petitioner were to have a meaningful opportunity to vindicate the important public policy which these civil rights laws contain. Petitioner asserted that he brought the lawsuit to fight unfair discrimination against handicapped people and that he was able to obtain counsel only because counsel was of the opinion that attorneys fees would be available if petitioner prevailed on the merits. If attorneys fees are not to be available in a case such as this, petitioner argued, airlines will be free to deny handicapped individuals their right to travel with impunity.

Finally, petitioner called the Court's attention to the national importance of the case flowing from the fact that *Hingson* has been relied upon to pre-empt civil rights statutes, as they affect airlines, in other jurisdictions. *See, e.g., Anderson v. USAIR, Inc.*, 818 F.2d 49, 57 (D.C. Cir. 1987) ("A state law obligation . . . is expressly pre-empted. . . . [S]ee . . . *Hingson*, 743 F.2d at 1415-16 (claim based on state law entitling blind persons to full and equal access pre-empted by Aviation Act.)").

In light of the importance of the remedies provided in Cal. Civ. Code § 54.3, petitioner argued that it was inconceivable that Congress intended to pre-empt California's civil rights laws as they affect airlines, adding that the implication of *Hingson* was staggering because:

> If an airline is free to deny passage to a handicapped person without being liable for damages under California's Anti-Discrimination Law, the airline is

equally free to deny passage based on race, sex or age.

On March 6, 1989 the Ninth Circuit denied rehearing.

REASONS FOR GRANTING THE WRIT

THE NINTH CIRCUIT'S HOLDING THAT THE FEDERAL AVIATION ACT PRE-EMPTS CALIFORNIA'S ANTI-DISCRIMINATION STATUTE, AS IT AFFECTS AIR COMMON CARRIERS, CONFLICTS WITH THIS COURT'S RECENT PRE-EMPTION CASES AND IMPERMISSIBLY INVADES A FIELD TRADITIONALLY OCCUPIED BY THE STATES.

Before demonstrating that *Hingson* is in clear conflict with this Court's pre-emption cases, petitioner calls the Court's attention to the nationwide impact of that erroneous decision. As already noted the United States Court of Appeals for the District of Columbia Circuit followed *Hingson*. *Anderson v. USAir, supra*. Predictably the district courts have fallen into line. *See Illinois Corporate Travel v. American Airlines*, 682 F. Supp. 378, 379 (N.D. Ill. 1988), and cases there cited ("All courts have unanimously held that, with [49 U.S.C. § 1305(a)], Congress intended to pre-empt all state statutes and common law rules which affect rates or services regarding air travel . . . .").

On April 18, 1989, this Court laid out the path to be followed in pre-emption cases. *California v. ARC America Corporation*, No. 87-1862, 57 L.W. 4425. Justice White speaking for a unanimous Court stated that "[i]n the absence of an express statement by Congress that state law is pre-empted," pre-emption occurs only when "Congress intends that federal law occupy a given field,"

when "compliance with both state and federal law is impossible," or when the state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of congress."

Justice White added that there is a "presumption against finding pre-emption of state law in areas traditionally regulated by the states." *See Hillsborough County v. Automated Medical Laboratories, Inc.*, 471 U.S. 707, 716 (1985). When Congress legislates in a field traditionally occupied by the States, the Court starts with the assumption "that the historic police powers of the States [are] not to be superseded by a Federal Act unless that was the clear and manifest purpose of Congress." *See, Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Pre-emption analysis begins with respect for "the separate spheres of governmental authority preserved in our federalist system. *Fort Halifax Packing Co. v. Coyne*, 482 U.S. [1] at 19." *Massachusetts v. Morash*, No. 88-32, 57 L.W. 4429, 4432 (Apr. 18, 1989).

Given the long history of state common law and statutory remedies forbidding discrimination by common carriers against disadvantaged groups, it is plain that Cal. Civ. Code §§ 54.1(a) and 54.3 operate in an area traditionally regulated by the States. The early common law attached to common carriers certain obligations including "the duty to serve all customers on reasonable terms without discrimination." *In re Cox*, 3 Cal. 3d 205, 212 (1970). The California Legislature, in 1897, enacted this common law doctrine into the statutory predecessor of the present Civil Rights Act, Cal. Civ. Code §§ 51, 52. *Id.* at 213. The 1897 Act provided:

> [A]ll citizens within the jurisdiction of this State shall be entitled to the full and equal accommodations, advantages, facilities, privileges, of . . . all . . . places of public accommodation. . . .

The Civil Rights Act was expanded in 1968, with the enactment of Cal. Civ. Code § 54.1(a), to specifically afford handicapped individuals some of the civil rights Cal. Civ. Code § 51 affords other disadvantaged groups.[5] That provision is merely a statutory extension of the common law. *See James v. Marineship Corp.*, 25 Cal. 2d 721, 730 (1944).

Statutes such as Cal. Civ. Code §§ 51 and 54.1(a) are declaratory of California's public policy, affording all persons equal access to common carriers. In *In re Marriage of Carney*, 24 Cal. 3d 728 (1979) the California Supreme Court pointed to Cal. Civ. Code § 54.1 as part of the growing body of legislation enacted to advance the state's public policy "to encourage and enable disabled persons to participate fully in the social and economic life of the state. . . ." *Id.* at 740. This State public policy is, of course, harmonious with federal public policy. *Id.* at 741 n.11 (Congress has enacted legislation inhibiting discrimination against handicapped individuals).

In light of these principles the Ninth Circuit erred in holding that California's anti-discrimination laws are nullified, as they affect airlines. There is no claim that the

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[5] In 1987 Cal. Civ. Code § 51 was expanded to protect handicapped individuals as well as other disadvantaged groups, Cal. Civ. Code § 51 (West 1989). The 1987 amendment does not apply to this case.

Federal Aviation Act expressly pre-empts State laws providing attorneys fees and treble damages to individuals subjected to handicap discrimination, and as *Nader, supra,* hold the antipre-emption provision of the Aviation Act furnishes strong support against the existence of pre-emption. *See Greater Westchester v. City of Los Angeles,* 26 Cal. 3d 86, 100 (1979), *cert. den.* 449 U.S. 820 (1980) (The savings clause of the Federal Aviation Act, 49 U.S.C. § 1506, would seem to preserve the validity of pre-existing state law involving "the State's traditional interest in compensating its citizens for damages incurred."); *see, also, People v. Western Airlines, Inc.,* 155 Cal. App. 3d 297 (1984) (State regulation of interstate air carriers is pre-empted only where the federal and state regulatory schemes conflict irreconcilably.).

Hingson did not give any weight to *Nader,* or 49 U.S.C. § 1506, relegating them to a footnote, stating:

> Because California Civ. Code § 54.1 would involve regulation of the services of an air carrier, we conclude that Hingson's claims under the state statute are pre-empted notwithstanding the savings clause in § 1506. Cf. *Nader* . . . (§ 1506 allows common law action for misrepresentation).

743 F.2d at 1416 n.11.

Hingson questioned the relevance of the antipre-emption provision stating that "[t]he legislative history of the Airline Deregulation Act of 1978 does not explain the relation between § 1506 and § 1305(a)." *Ibid.* The Seventh Circuit, by contrast, concluded § 1506 saves remedies provided by state statutes "even when federal law exclusively determines the content of the substantive rules." *Bieneman v. City of Chicago,* 864 F.2d 463, 471 (7th Cir.

1988), *cert. den.* No. 88-1496 (May 22, 1989). In *Bieneman* the Court stated that *Nader* holds that the savings clause "preserves against pre-emption a claim for fraudulent misrepresentation; that state courts award compensation for takings in inverse condemnation cases; and that state courts "award damages every day in air crash cases, notwithstanding that federal law pre-empts the regulation of safety in air travel." *Id.* at 471. Under these circumstances the Court concluded that damages should also be available on questions of noise and chemical emissions by airlines.

Bieneman overruled *Luedtke v. County of Milwaukee,* 521 F.2d 387 (7th Cir. 1975), which held that state tort law was pre-empted by the Federal Aviation Act stating:

> Since the federal laws and regulations have pre-empted local control of aircraft flights, *Burbank [v. Lockheed Air Terminal Inc.,* 411 U.S. 624 (1973)], the defendants may not, to the extent they comply with such federal laws and regulations, be charged with negligence or creating a nuisance. Similarly, . . . Wisconsin statutes cannot be invoked to make unlawful flights which are in accordance with federal laws and regulations. . . .

521 F.2d at 391.

In overruling *Luedtke Bieneman* stated:

> Since *Luedtke* every court that has examined the question independently has come to the opposite conclusion. *Greater Westchester Homeowners Ass'n v. City of Los Angeles,* 26 Cal. 3d 86, 100 (1979) *cert. den.* 449 U.S. 820 (1980). . . . The Solicitor General, in a brief filed at the Supreme Court's invitation in *Greater Westchester,* informed the Court that *Luedtke* had been

> decided incorrectly but that because *Luedtke* stood alone the conflict did not require resolution.

864 F.2d at 470-71.

Bieneman observed that the plaintiff in the case before it wanted "damages, not regulations," adding that "[p]erhaps this is a distinction without a difference," because "[a]n award of damages is compensatory from Bieneman's perspective, but from [the airport's] it is no different from regulation." *Id.* at 472. Logically, the Court stated, "[t]he identity of common law damages and penalties for disobedience to substantive rules could lead to a conclusion that where a state is forbidden to alter the substantive rule, it is forbidden to award damages" but, the Court of Appeals added *"Silkwood v. Kerr-McGee* rejects this equation." *Id.* at 472. The Seventh Circuit stated that since *Pacific Gas & Electric Co. v. State Energy Conservation & Development Comm'n*, 461 U.S. 190 (1983) held that federal law occupies the field of nuclear safety regulation, it would appear to be a truism "that an award of hefty compensatory and punitive damages" was a forbidden method of regulating safety. Nevertheless, the Court of Appeals observed, *Silkwood* held "that federal law does not pre-empt common law remedies concerning nuclear safety." *Silkwood*, the Court of Appeals concluded, highlights the extreme reluctance of the Court to find pre-emption, adding:

> if no pre-emption is the conclusion notwithstanding the absence from nuclear safety legislation of a statute such as § 1106 [The Aviation Act's Antipre-emption provision] it must be the appropriate treatment of air travel as well. *Luedtke* did not mention any of these considerations, and its holding cannot be maintained in the face of them."

Id. at 472. Similarly, in the case at bar the Ninth Circuit did not mention any of these considerations, and its holding that §§ 54.1(a) and 54.3 are pre-empted cannot be maintained in the face of settled law.

Hingson suggested that pre-emption was required because of a Civil Aeronautics Board regulation dealing with handicap discrimination by airlines. 473 F.2d at 1415. That regulation, however, did not purport to be exclusive, nor did it suggest in any way that there was no room for a state law to require an air common carrier guilty of handicap discrimination to pay attorney's fees and treble damages. In *Hillsborough County Fla. v. Auto. Med. Labs, supra,* the Court rejected the argument that pre-emption may be inferred from comprehensive administrative regulations stating:

> To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulation will be exclusive. Such a rule, of course, would be inconsistent with the federal/state balance embodied in our supremacy clause jurisprudence. *See Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977).

Id. at 719.

The petition for writ of certiorari should be granted because this case is of national importance, affecting hundreds of thousands of mobility handicapped individuals who regularly face thoughtless or intentional discrimination by airlines. Unless those subjected to unlawful discrimination can avail themselves of the remedies provided by Cal. Civ. Code § 54.3 – attorneys fees and treble damages – they will be denied a meaningful opportunity to vindicate their rights, because compensatory

damages for a civil rights violation are usually inadequate to justify the difficult litigation entailed in such cases. The record in this case reveals that the litigation would never have been undertaken if counsel did not believe he would be entitled to reasonable fees if he succeeded. If such fees are not to be available in the future, counsel will not be available.

Hingson is the leading case holding that the Federal Aviation Act pre-empts state statutes such as Cal. Civ. Code §§ 54.1(a) and 54.3, and it has spawned the rule that 49 U.S.C. § 1305(a) pre-empts "*all* state statutes and common law rules" which *may* "affect rates or services regarding air travel." *Illinois Corporate Travel v. American Airlines, supra,* 682 F. Supp. at 379. The petition for writ of certiorari should be granted, and this case should be used as the vehicle to undo the mischief caused by *Hingson.*

CONCLUSION

For the aforesaid reasons the petition for writ of certiorari should be granted.

Dated: June 2, 1989

Respectfully submitted,

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APPENDIX A

NOT FOR PUBLICATION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM DYKENS, Plaintiff-Appellant, v. EASTERN AIRLINES, INC., et al., Defendants-Appellees.	) No. 87-5843) D.C.# CV-86-2553-WMB)) MEMORANDUM*)) FILED JAN 5 1989

Appeal from the United States District Court
for the Central District of California
William Matthew Byrne, Jr., District Judge, Presiding
Argued and submitted December 9, 1988
Pasadena, California

Before: BROWNING, SCHROEDER, and NOONAN, Circuit Judges.

The appellant appeals from the district court's decision that he was not entitled to treble damages and attorney's fees under California law after prevailing in his action for breach of the common law duty of carriage by a common carrier.

The plaintiff's action arose out of defendant's refusal to seat him on a flight. Eastern's refusal was based on his handicap, and he claimed unlawful discrimination on the

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*This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

basis of both state and federal law. The district court held that there was no federal or state statutory remedy available, but awarded $15,000 on a common law theory. The airline did not cross-appeal.

On appeal, Dykens first claims entitlement to treble damages and attorney's fees pursuant to Cal. Civ. Code § 54.3 (West 1982). The district court correctly found this statute to be preempted, relying upon our decision in *Hingson v. Pacific Southwest Airlines*, 743 F.2d 1408 (9th Cir. 1984). In *Hingson* we stated that:

> [Federal] preemption [by the Federal Aviation Act, 49 U.S.C. § 1305(a)] is not limited to those state laws or regulations that *conflict* with federal law. It preempts state laws and regulations "*relating* to rates, routes, or services." Regulation of air carrier seating policies for handicapped passengers involves the regulation of services within the meaning of [the Federal Aviation Act].

Hingson, 743 F.2d at 1415 (original emphasis) (citations omitted). Just as the passenger's claim for unlawful discrimination on the basis of a handicap was held preempted in *Hingson*, so must this similar claim be held preempted here. This case is unlike *Air Transport Ass'n v. Public Utilities Commission*, 833 F.2d 200, 207 (9th Cir. 1987), where we stated that the Federal Aviation Act did not preempt California utility regulations that prohibited the surreptitious monitoring of employees' telephone conversations. In *Air Transport* we noted that there was nothing in the history of the Airline Deregulation Act to indicate a congressional intent to preempt state regulation of utilities insofar as such regulation affected airlines. *Id.* Unlike *Air Transport*, the case at bar is indistinguishable from *Hingson*, and the claim for treble

damages and attorney's fees is preempted by the Federal Aviation Act. 49 U.S.C. app. § 1305(a)(1)(1982).

We then turn to plaintiff's claim of entitlement to attorney's fees on the basis of Cal. Civ. Proc. Code § 1021.5 (West 1980). The airline argues that in view of the preemption of state law in this field, the district court's award of relief must have been based upon federal as opposed to state common law. The district court's reasoning is not entirely clear on this point. Even assuming appellant is correct that the ruling was based upon state common law, and disregarding for the moment the preemption problems inherent in such a ruling, we must nevertheless conclude the denial of fees under section 1021.5 was not an abuse of discretion. The incident here was an isolated failure by a single employee to follow Eastern's policies. No pattern or practice of discrimination appears. Although the vindication of existing rights may be a basis for an award of fees under section 1021.5, *see Press v. Lucky Stores, Inc.*, 34 Cal.3d 311, 318, 193 Cal. Rptr. 900, 904 (1983), we perceive no abuse of discretion in the determination that this is not an appropriate case for the award of fees.

Finally, Eastern seeks attorney's fees and costs, alleging this appeal is frivolous. Fed. R. App. P. 38. While appellant's claims are ultimately unpersuasive, we do not believe them frivolous.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WILLIAM DYKENS, Plaintiff, v. EASTERN AIRLINES, INC., et al., Defendants.	CV 86-2553-WMB FINDINGS OF FACT AND CONCLUSIONS OF LAW FILED MAR 25 1987

This case was tried by the Court without a jury. The Court now makes the following Findings of Fact and Conclusions of Law:

FINDINGS OF FACT

1. Defendant, Eastern Airlines, Inc. (Eastern), is a certified scheduled airline and a common carrier.

2. Plaintiff, William Dykens, is a non-ambulatory physically disabled person as a result of cerebal palsy.

3. As a certified air carrier, Eastern was required to file, and did file, a tariff showing its rules, regulations, practices, and services in connection with air transportation. The tariff which was in effect as of July 6, 1985 provided:

> [Eastern] accepts for transportation a non-ambulatory passenger who is capable of caring for his or her own needs while on board an [Eastern] aircraft provided:

> (a) [Eastern] is advised of the nature of the non-ambulatory passenger's condition and
>
> (b) Reservations are made 24 hours or more in advance of the scheduled departure time of the flight on which the non-ambulatory passenger seeks to travel. . . .

4. As a certified air carrier, Eastern is subject to Subpart A of the Regulation prohibiting discrimination on the basis of handicap. 14 C.F.R. Ch. II. The purpose of Subpart A "is to ensure that handicapped persons receive adequate air transportation service, without unjust discrimination based on handicap," and it provides that certified carriers "shall not discriminate against any qualified handicapped person because of that person's handicap." 14 C.F.R. §§ 382.1 and 382.4.

5. Plaintiff is a "qualified handicapped person" and was eligible to board a carrier aircraft as a non-ambulatory person able to take care of his own needs.

6. Plaintiff had a reservation for Eastern Airlines Flight 80 scheduled to depart at Los Angeles International Airport on July 6, 1985 at 10:55 p.m.

7. Plaintiff made his reservation through Eastern's reservation agent more than 24 hours prior to flight time. In making the reservation, he advised the agent that he was disabled, used a wheelchair and needed certain assistance getting on and off the plane. Plaintiff was advised that there would be no problem. He then purchased a roundtrip Eastern ticket to and from Syracuse, New York, through a travel agency.

8. Plaintiff arrived at the check-in counter late for Flight 80. Plaintiff was further delayed by the turmoil at the ticket counter, for which plaintiff was not responsible.

9. Plaintiff checked his baggage at the ticket counter, and it was placed on Flight 80.

10. The agent at the ticket counter told plaintiff to proceed to the departure gate and told him that he had only five minutes to get to the plane. Plaintiff testified that the agent told him she would call the gate and tell them he was coming.

11. The aircraft was ready for departure when plaintiff arrived at the airplane gate. However, the aircraft was still available for boarding at that time. The airplane was scheduled for departure at 10:55 p.m. The actual "push back" time from the gate for this flight on the evening of July 6, 1985 was 11:20 p.m.

12. The agent at the gate advised plaintiff that he could not fly without an attendant because he was physically disabled and non-ambulatory. The gate agent then changed his mind and told plaintiff he could board.

13. Then, the flight stewardess and flight engineer, either separately or jointly, decided that plaintiff would not be allowed to board the aircraft.

14. Plaintiff was not permitted to board Flight 80 by agents of defendant.

15. Eastern responded in a reasonable manner after it wrongfully denied plaintiff passage on Flight 80.

16. Eastern made a reservation for plaintiff on the next available flight.

17. Plaintiff flew unattended on the next available flight, departing Los Angeles International Airport at approximately 7:00 a.m. the next morning, July 7, 1985 and plaintiff flew with no problems experienced en route.

18. Plaintiff did not sustain any physical injury as a result of the subject incident.

19. Plaintiff was damaged as a result of the denied boarding as follows: experienced the inconvenience of making another trip to the airport by a handicapped person; missed one day of vacation; was without his belongings for one day as these were transported as baggage on Flight 80; spent one further day in Los Angeles; and suffered justifiable emotionally severe agitation of a temporary nature.

20. Plaintiff was not lastingly or permanently damaged by the incident; his overall self esteem was not damaged and the agitation did not have a lasting effect.

21. Reasonable compensation for the damages suffered by plaintiff is the sum of $15,000 plus costs.

22. Eastern did not act with malice, fraud or oppression nor did Eastern act with conscious disregard or subject plaintiff to any hardship in conscious or willful disregard herein.

23. Eastern's conduct was not extreme or outrageous.

24. As to the availability of an award of attorney fees under California Code of Civil Procedure Section 1021.5 (a codification of the private attorney general doctrine), that section, if applicable, may be an appropriate basis for an award of attorney fees in this case.

25. Plaintiff is not entitled to attorney fees under Section 1021.5 because this case did not result in the enforcement of an important right affecting the public interest nor did it vindicate an important public interest.

26. This case did not involve a challenge to airline policies or rules of procedure. Rather, the case involved an incident where individual employees made mistakes that deprived plaintiff of rights to which he was entitled. The judgment was a victory for plaintiff individually.

27. The case has not brought about any changes in Eastern's policies towards handicapped persons.

28. Any Conclusion of Law deemed to be a Finding of Fact is hereby incorporated into these Findings of Fact.

CONCLUSIONS OF LAW

1. Any Finding of Fact deemed to be a Conclusion of Law is hereby incorporated into these Conclusions of Law.

2. Plaintiff is a resident of the State of California. Defendant Eastern Airlines is a foreign corporation. The matter in controversy exceeds $10,000.00 exclusive of interest and costs. The Court has diversity jurisdiction pursuant to 28 U.S.C. § 1332(a)(1).

3. Eastern is not a recipient of federal financial assistance and is therefore not subject to the Rehabilitation Act, 29 U.S.C. § 794.

4. Plaintiff does not have a private cause of action under the Federal Aviation Act, 49 U.S.C. § 1374(a).

5. Eastern is not liable for a claim for intentional infliction of emotional distress.

6. Eastern is not liable for a claim for negligent infliction of emotional distress.

7. Plaintiff's claims under California Civil Code §§ 54.1 and 54.3 are preempted by 49 U.S.C. § 1305(a).

8. The damage and attorney fee provisions of California Civil Code § 54.3 do not apply to an actionable violation of a common law duty of denied boarding.

9. Eastern breached its common law duty of carriage as a result of a violation of its tariff, its Standard Operating Practices, and the governing regulation prohibiting discrimination against qualified handicapped people.

10. Eastern is liable to plaintiff for a breach of its common law duty under *Nader v. Allegheny Airlines, Inc.*, 426 U.S. 290, 96 S. Ct. 1978 (1976).

11. Plaintiff is not entitled to the recovery of punitive damages.

12. Plaintiff is not entitled to an award of attorney fees under California Code of Civil Procedure § 1021.5.

13. Judgment shall enter accordingly, awarding plaintiff damages in the sum of $15,000, plus costs.

DATED: March 25, 1987

/s/ Wm. Matthew Byrne
Wm. Matthew Byrne, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

WILLIAM DYKENS,	) No. 87-5843
Plaintiff-Appellant,	) D.C.# CV-86-2553-WMB
v.	) (Central California)
EASTERN AIRLINES, INC., et al.,	) ORDER
Defendants-Appellees.	) FILED MAR 6 1989

Before: BROWNING, SCHROEDER, and NOONAN, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.